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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. CHRISTIAN HERNANDEZ, Defendant and Appellant.	B266101 (Los Angeles County Super. Ct. No. PA082276)

APPEAL from a judgment of the Superior Court of Los Angeles County, David B. Gelfound, Judge. Affirmed as modified.

Stanley Dale Radtke, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, and Thomas C. Hsieh, Deputy Attorney General, for Plaintiff and Respondent.

Police officers executed a search warrant at defendant's apartment and found over a hundred doses of methamphetamine, about $3,800 in cash, and a firearm. Defendant is a member of the Pacoima Cayuga gang, his apartment was located in territory claimed by his gang, and certain walls and doors of his apartment were covered with gang graffiti. A jury found defendant possessed the methamphetamine for sale and maintained his apartment as a place to sell and use narcotics. The jury also found true allegations that defendant committed his offenses for the benefit of a criminal street gang. We consider the sufficiency of the evidence to support the jury's true findings on the gang allegations, and in resolving that issue, we are also asked to decide whether aspects of a gang expert witness's testimony constituted hearsay and were admitted in violation of defendant's constitutional right to confront witnesses against him. We also consider additional claims of error, including the contention that the trial court wrongly denied a defense *Batson/Wheeler* motion[1] claiming the prosecution used peremptory challenges to intentionally discriminate against Latino jurors.

I. BACKGROUND

A. Execution of a Search Warrant at Defendant's Apartment

Early in the morning on October 16, 2014, a large contingent of Los Angeles Police Department (LAPD) officers were dispatched to an apartment complex located at 13801 Hoyt Street in Pacoima—specifically to apartment 111. They were responding to a 911 call reporting gang members were fighting and a woman was getting beaten up and screaming for help.

Officer Airam Potter knocked at the door of unit 111 multiple times over the course of about five minutes. During that time, Officer Potter heard voices and sounds of

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[1] *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*). Although defendant made his motion only under *Wheeler*, we treat such a motion as a motion under *Wheeler* and *Batson* on appeal, and we refer to the defense motion as a *Batson*/*Wheeler* motion throughout this opinion. (*People v. Chism* (2014) 58 Cal.4th 1266, 1309, fn. 14.)

movement, including doors being opened and closed. Defendant eventually opened both the wooden apartment door and an outer metal security door, and he handed a piece of paper to Officer Potter. It was an eviction notice with defendant's name on it.

Officer Potter told defendant everyone had to come out of the apartment. She asked him how many people were inside, and he replied one. Eventually, however, defendant and four other people came out of the apartment—three women, including Delores Flores (Flores), and one man. Officers then entered the apartment to look for other people. They found a man, a woman, and two children in an upstairs bedroom, and all four appeared to be asleep. When the police officers announced their presence, the children woke up and eventually the man did too. The woman, however, did not, and Officer Potter dragged her off the mattress, lifted her up, and had to hold her steady. Officer Potter formed the opinion that the woman was under the influence of a narcotic.

As Officer Potter went up and down the stairs clearing the apartment of people, she noticed a white crystal-like powder scattered on the carpet on the stairs that resembled crystal methamphetamine. During her sweep of the apartment, Officer Potter also noticed a monitor attached to outside surveillance cameras in an upstairs bedroom. The video from the cameras showed the outside of the apartment complex.

As part of the investigation, police detained Flores. Officer Potter searched Flores before she was put into a police car and discovered a clear plastic bag containing a substance which resembled crystal methamphetamine. According to Officer Potter, Flores said she had come with her friend "to this apartment complex, apartment, and they were getting high, and [defendant] said if you want to get high. And then there was a door knock" and defendant told everyone to go upstairs and then "she heard [defendant] say 'Just dump it,' and she saw [defendant] take guns to the other room."[2]

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[2] Flores was a reluctant witness at trial, and she denied making these statements Officer Potter attributed to her. When questioned about a written statement she gave to police, Flores said she was "pretty high" and did not remember giving a written statement.

LAPD Detective Guy Pereira obtained and, with other detectives, executed a search warrant for unit 111. In one bedroom, they found a bag containing 6.24 grams of a substance later determined to be methamphetamine, an electronic money counter, brass knuckles, an electronic scale, two bullets, and mail with defendant's name on it. In another bedroom, they found $3,880 inside a cereal box. They found another bullet in the kitchen and a loaded handgun, later determined to be stolen, at the bottom of a staircase. Detective Pereira also photographed extensive graffiti on walls and doors inside the apartment, including in a room off the garage on the first level of the apartment, bedrooms on the third floor, and multiple bathrooms.

B. Expert Testimony at Trial

LAPD Officer Travis Coyle testified as a narcotics expert for the prosecution. He opined that the 6.24 grams of methamphetamine found in the apartment constituted 108 individual uses. In response to a hypothetical based on the facts of this case, Officer Coyle opined that the methamphetamine was possessed for sale.

Officer Coyle also testified that over the preceding two years, police had received numerous complaints about gang activity, narcotics sales, and vehicle crimes at the Hoyt Street apartment complex. He testified that a "crash pad" was a location where people use narcotics or gang members congregate, and in his opinion, defendant's apartment was a crash pad.

LAPD Officer Roberto Martinez, a member of the Foothill Division's Gang Enforcement Detail, testified as the prosecution's gang expert. He described aspects of criminal gang culture and offered testimony about the Pacoima Cayuga gang, which he himself had investigated.

Officer Martinez explained that gangs make money through a variety of criminal activities. Gangs identify areas, which they consider their territory, and commit most of their criminal activity within that area. They consider their territory to be a safe zone, and will protect it. Gangs write graffiti to tell "everybody, hey, this is our gang. It's a

message and a challenge to rivals or other gang members, hey, we are here. This is our gang. This is what we do."

Officer Martinez explained that the "dynamic of gangs is, you know, the gang members' activities benefit the gang, and the gangs' activity benefits the gang." He explained when a gang member "goes out and robs a bunch of liquor stores . . . [t]hose proceeds have to go back to the gang. In return, the gang buys more guns, buys more drugs to sell, getting more guns, they have more guns to do robberies with and now two people out there to do robberies, get more money, so it feeds on itself."

Officer Martinez explained that the Pacoima Cayuga gang was a Latino gang formed in the late 1980's or early 1990's. At the time of the offense in this case, the gang had about 30 members. The gang was also known as Cayuga Street Locos, Pacoima Cayuga Locos, "CL," "CSL" and "PC." Members wore Pittsburgh Steelers and Pittsburgh Pirates attire, including hats with a "P" on them. They used hand signs to form the letters "PC."

According to Officer Martinez, the Pacoima Cayuga gang's primary activities are narcotics sales, robberies, and witness intimidation. The gang members engaged in these activities "consistently and repeatedly." When asked to explain the basis of his knowledge of the gang's activities, Officer Martinez answered: "By speaking with other officers that have investigated crimes for—or involving Cayuga Street Locos, reviewing reports and investigating them myself." Officer Martinez also testified about certified conviction records the prosecution introduced to establish the predicate gang crimes that must be proven for a criminal street gang enhancement to apply. He explained Pacoima Cayuga gang member Jose Santos had been convicted of being a felon in possession of a firearm in January 2015, and Pacoima Cayuga gang member Cristobal Solano had been convicted of taking a car in July 2012.

Officer Martinez opined that defendant was a member of the Pacoima Cayuga gang. He based his opinion on admissions of gang membership defendant made to him (Martinez) and to other officers, on seeing defendant associate with other Pacoima Cayuga gang members, and on other gang members' statements that defendant was a

member of the gang. Officer Martinez also testified defendant had "Pacas," signifying the Pacoima Cayuga gang, prominently tattooed on his back.

Defendant's apartment was in territory claimed by the Pacoima Cayuga gang. Officer Martinez reviewed photos taken during the execution of the search warrant at defendant's apartment. He recognized the graffiti on the walls and doors as making reference to the Pacoima Cuyaga gang, as well as other criminal street gangs that are allies of the Pacoima Cuyaga gang.

Toward the end of Officer Martinez's testimony, the prosecutor posed a hypothetical question tracking the facts of this case. The prosecutor asked Martinez to assume, among other things: a gang member was living in an apartment at the Hoyt Street apartment complex; the gang member's apartment had video cameras monitoring the outside of the unit; methamphetamine, drug paraphernalia, cash, and guns are all found in the apartment; and the apartment has "multiple specific walls with gang graffiti for different allied gangs." The prosecutor then asked whether the crimes described by the assumed facts would be committed for the benefit of, at the direction of, or in association with a criminal street gang with a specific intent to promote or further or assist in criminal conduct by gang members, and Officer Martinez opined they would. Officer Martinez explained he formed his opinion based on the apartment occupant "having a gang membership, in possession of these narcotics for sales, that benefits the gang because, like I said earlier, they can use the proceeds to bail people out, buy more guns, pay legal fees and not hold a job. They are making a lot of money for the gang, so they are devoted to it. And, like I said earlier, the activities of the gang member benefit the gang. The gang is gonna give them protection to further increase their criminal enterprise, and that's what I formed my opinion on." Officer Martinez further explained that the gang graffiti assumed in the hypothetical question is "a message to everybody that goes in there. It says, hey this is Cayuga Street. These are the gangs. This is who we are. This makes them seem bigger when they have a lot of gangs. Don't mess with us. This is our house."

C. The Defense

Defendant did not present any evidence in his defense. Through cross-examination of prosecution witnesses, defendant sought to portray himself as a resident of the apartment and not the person who was conducting narcotics sales there. For example, defendant attempted to elicit testimony from Officer Martinez that none of the gang graffiti in the apartment depicted defendant's gang moniker. The defense also argued a drug dealer would have an abundance of cash, but defendant's eviction notice was evidence that defendant did not have much money.

D. Verdicts and Sentence

The jury convicted defendant of one count of possession for sale of a controlled substance in violation of Health and Safety Code section 11378, one count of possession of a controlled substance with a firearm in violation of section 11370.1, subdivision (a), and one count of maintaining a place for selling or using a controlled substance in violation of section 11366. The jury found true the allegations that the offenses were committed for the benefit of a criminal street gang within the meaning of Penal Code section 186.22, subdivision (b).[3]

The trial court sentenced defendant to a total of 14 years in state prison. The court imposed a 12-year term for the firearm-related conviction, consisting of the upper term of four years for the conviction plus a four-year enhancement term pursuant to section 186.22, subdivision (b), plus two two-year enhancement terms pursuant to section 12022.1. The trial court imposed a consecutive two year term for the possession for sale conviction, consisting of one-third the mid-term of eight months for the conviction plus 16 months for the gang enhancement. The court imposed a concurrent five year term for the section 11366 conviction.

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[3] Undesignated statutory references that follow are to the Penal Code.

II. DISCUSSION

Defendant presents two insufficiency of the evidence claims, neither of which we find persuasive. As to the first claim, regarding the evidence in support of the jury's true findings on the gang enhancement allegations, we hold there was sufficient evidence, including the testimony of gang expert Martinez, the bulk of which was not impermissible testimonial hearsay under our Supreme Court's recent decision in *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*) and the remainder of which was harmless and does not warrant reversal. As to the second claim, regarding the evidence in support of the conviction for maintaining a place to use or sell drugs, we hold the surveillance cameras, drugs, and a substantial amount of cash in the apartment support an inference of continuous and repetitive activity sufficient to sustain the conviction.

Defendant additionally contends the trial court's finding that the prosecutor had genuine race-neutral reasons for peremptorily challenging three Hispanic jurors is not supported by substantial evidence. Although the prosecution's demeanor-based justifications for the challenges were not articulated with the requisite specificity and therefore could not have carried its burden to articulate legitimate, race-neutral reasons, the non-demeanor-based reasons given by the prosecution are appropriately grounded in the record and do constitute substantial evidence supporting the trial court's finding there was no intentional discrimination.

Finally, defendant asks us to correct a minor miscalculation in his sentence and to review the sealed transcript of the in camera hearing on his *Pitchess*[4] motion. We do both.

A. Sufficiency of the Evidence Contentions

"'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable,

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[4] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' (*People v. Lindberg* (2008) 45 Cal.4th 1, 27[ ].) We determine 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' (*Jackson v. Virginia* (1979) 443 U.S. 307, 319[ ].) In so doing, a reviewing court 'presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' (*People v. Kraft* (2000) 23 Cal.4th 978, 1053[ ].) 'This standard applies whether direct or circumstantial evidence is involved.' (*People v. Catlin* (2001) 26 Cal.4th 81, 139[ ].)" (*People v. Avila* (2009) 46 Cal.4th 680, 701.)

1. Sufficient evidence supports the gang enhancements

Section 186.22, subdivision (b)(1) provides an enhanced sentence for "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." Thus, to prove an allegation under section 186.22, subdivision (b)(1) true, the prosecution must introduce evidence to establish both statutory elements: (1) that the underlying crime was "gang related" and (2) that the defendant acted with the designated specific intent. (*People v. Albillar* (2010) 51 Cal.4th 47, 59.) An expert can properly "express an opinion, based on hypothetical questions that track[ ] the evidence, whether the [crime], if the jury found it in fact occurred, would have been for a gang purpose. 'Expert opinion that particular criminal conduct benefited a gang' is not only permissible but can be sufficient to support the Penal Code section 186.22, subdivision (b)(1), gang enhancement. [Citation.]" (*People v. Vang* (2011) 52 Cal.4th 1038, 1048.)

As we now explain, defendant's conduct in committing the charged crimes, together with the expert's testimony concerning gang behavior, is sufficient evidence to establish both of the required statutory elements of a section 186.22, subdivision (b)(1)

allegation.[5] And contrary to defendant's contentions, the aspects of the gang expert's testimony defendant challenges do not warrant reversal under *Sanchez*.

a. gang related

There is substantial evidence defendant's crimes were gang-related. The evidence showed defendant, a member of the Pacoima Cayuga gang, possessed drugs for sale from his apartment, which was located in territory claimed by Pacoima Cayuga, and in a complex within that territory well known for criminal activity, including criminal gang activity. Walls and doors inside the apartment bore extensive graffiti for the Pacoima Cayuga gang and five allied gangs. The jury could reasonably infer defendant intended to convey to purchasers that he was selling narcotics in association with the Pacoima Cayuga gang even without the gang expert's testimony that gang graffiti is a "message" to those coming to the apartment. Committing a crime in gang territory and proclaiming an affiliation with that gang while doing so are classic indicia of gang related activity. The only twist in this case is that defendant was proclaiming his affiliation to willing customers rather than unwilling victims, and the proclamations were in writing rather than spoken. But these differences are immaterial for purposes of analyzing whether there is substantial evidence the crimes were gang related.

In addition, gang expert Martinez testified gang dynamics require gang members to turn over proceeds from their criminal activities to the gang. He listed several ways in which gangs use those proceeds to promote, further, and assist criminal conduct by gang members. This list included buying more drugs to sell, buying more guns to use in robberies, and providing protection to further increase the criminal enterprise. In the case

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[5] Because "we determine that a rational trier of fact could have found the essential elements of the [enhancement] proven beyond a reasonable doubt, the due process clause of the United States Constitution is satisfied [citation] as is the due process clause of article I, section 15 of the California Constitution." (*People v. Osband* (1996) 13 Cal.4th 622, 690.)

of the Pacoima Cayuga gang, its members committed robberies and drug sales "consistently and repeatedly."

To the extent that defendant contends this testimony is speculative, defendant is mistaken. "In addition to matters within their own personal knowledge, experts may relate information acquired through their training and experience, even though that information may have been derived from conversations with others, lectures, study of learned treatises, etc." (*Sanchez*, *supra*, 63 Cal.4th at p. 675.) "When giving such testimony, the expert often relates relevant principles or generalized information rather than reciting specific statements made by others." (*Ibid*.) Officer Martinez explained his information about gang culture came from training at the police academy, experience working with gang officers and then in the gang detail, hundreds of contacts with gang members during which he discussed gang history and culture, and conversations with a wide array of law enforcement personnel. He was also familiar with the Pacoima Cayuga gang, including by virtue of having investigated crimes committed by the gang himself. Thus, his testimony on gang dynamics involving criminal proceeds had a basis in fact, as did his testimony about the primary activities of the Pacoima Cayuga gang.

Defendant compares the facts of his case to four other cases, three of which involve gang members acting alone, in an attempt to show that Officer Martinez's testimony was speculative and unsupported. (*In re Frank S.* (2006) 141 Cal.App.4th 1192; *People v. Ramon* (2009) 175 Cal.App.4th 843 (*Ramon*); *People v. Ochoa* (2009) 179 Cal.App.4th 650; *People v. Rios* (2013) 222 Cal.App.4th 542.) These cases do not assist defendant.

In all four cited cases, the defendants made no display of gang membership. They were not dressed in gang attire and did not display gang signs or call out gang names. Three of the four cases also involved crimes not committed in gang territory. (*In re Frank S.*, *supra*, 141 Cal.App.4th at p. 1195, 1199; *Ramon*, *supra*, 175 Cal.App.4th at p. 847 [in gang territory]; *People v. Ochoa*, *supra*, 179 Cal.App.4th at p. 653, 662; *People v. Rios*, *supra*, 222 Cal.App.4th at p. 574.) And in *Ramon*, the best case for defendant, there were no facts that linked the crimes at issue (receiving a stolen vehicle and possession of

a firearm offenses (*Ramon*, *supra*, at p. 848)) to a crime likely to be committed by the gang, and thus, nothing to support the gang expert's opinion that the crimes were gang-related. (*Id.* at p. 853 ["The analysis might be different if the expert's opinion had included 'possessing stolen vehicles' as one of the activities of the gang. That did not occur and we will not speculate"].) Here, defendant did effectively proclaim his gang affiliation in connection with his crimes, as we have discussed, and drug sales were among Pacoima Cayuga's primary activities. Thus, defendant's behavior in committing his crimes supports Officer Martinez's expert opinion that the crimes were gang-related.

b. specific intent

There is no direct evidence that defendant's sales of narcotics were specifically intended to promote, further or assist criminal conduct by other gang members, but intent is rarely proven through direct evidence. It must usually be inferred from the facts and circumstances surrounding the defendant's offense. (*People v. Miranda* (2011) 192 Cal.App.4th 398, 411-412 [discussing proof of intent required for gang enhancement].) In case of a gang enhancement, the specific facts and circumstances of the offense may be considered in the context of evidence of gang culture. (*Id*. at p. 412; *Sanchez*, *supra*, 63 Cal.4th at p. 676 [expert may "testify about more generalized information to help jurors understand the significance of case-specific facts"].)

The jury could properly rely on Officer Martinez's expert testimony, together with the specifics of defendant's criminal behavior, to arrive at a conclusion concerning defendant's intent. The jury could reasonably infer that defendant, as a gang member, was aware of the financial dynamics of criminal street gangs, including the requirement that at least a portion of proceeds from criminal activity be turned over to the gang to assist criminal activities by gang members. The expert testimony on gang culture and custom also emphasized the point, consistent with a common sense inference, that money paid to the gang would be used to facilitate additional criminal activity by gang members.

There was also a proper evidentiary basis on which the jury could infer that defendant intended to comply with the requirement to pay a portion of the drug sale

proceeds to his gang. Defendant possessed narcotics with intent to sell them (a point defendant does not contest on appeal), and as we just explained, he possessed the drugs in his gang's territory and in an apartment where there was graffiti that proclaimed his gang affiliation and the support of allied gangs in the area to those who entered (like the man, woman, and children found by police upstairs). The surveillance cameras, drugs, and currency found in the apartment would permit a rational inference defendant was conducting a relatively notorious operation, with many customers. With such an operation running out of his apartment, a jury could conclude other members of his gang and allied gangs were aware defendant was possessing drugs for sale, and it would be foolhardy for defendant to do so in defiance of gang requirements, explained by Martinez, that required part of the money from drug sales to go back to the gang. The only reasonable inference from defendant's conduct is that he intended to comply with and benefit from gang dynamics concerning proceeds from criminal sales, and by doing so intended to promote or assist the consistent and repeated commission of robberies, drug sales, and other crimes by members of his gang.

Thus, the evidence present here is again different from the four cases cited by defendant. Those cases involved illegal weapons and stolen vehicles which could be used to assist in other gang-related crimes, but there was no evidence the defendants intended to do so. The gang experts did not indicate that they had any special knowledge that gangs require or expect their members to turn over such "tools" for use by the gang in future crimes. (*In re Frank S., supra*, 141 Cal.App.4th at p. 1199; *People v. Ramon, supra*, 175 Cal.App.4th at pp. 847-848; *People v. Ochoa, supra*, 179 Cal.App.4th at pp. 662-663; *People v. Rios, supra*, 222 Cal.App.4th at p. 574.) Thus, the experts had no basis to opine that the defendants would use the weapons or vehicles to assist in future criminal conduct by other gang members. Officer Martinez did testify that he had special knowledge that gangs require their members to turn over proceeds from criminal activity to the gang to assist in future criminal conduct by gang members. He did have a basis to opine that defendant undertook the charged offenses with the specific intent to further or assist in criminal conduct by gang members.

c. expert testimony and the hearsay rule

While defendant's appeal was pending, our Supreme Court issued its opinion in *Sanchez*, *supra*, 63 Cal.4th 665. Defendant filed a supplemental brief contending certain portions of Officer Martinez's expert testimony are testimonial hearsay, and the admission of that evidence violated his constitutional confrontation right, as described in *Sanchez*. Specifically, defendant's supplemental brief challenges two aspects of Martinez's testimony: his statement in answering the prosecutor's hypothetical question about whether drug sales would be for the benefit of the gang and his "testimony involving [defendant] and his association and activities within the Pacoima Cayuga Gang."

In *Sanchez*, the Supreme Court explained "experts may relate information acquired through their training and experience, even though that information may have been derived from conversations with others, lectures, study of learned treatises, etc." (*Sanchez, supra*, 63 Cal.4th at p. 675.) "An expert's testimony as to information generally accepted in the expert's area, or supported by his own experience, may usually be admitted to provide specialized context the jury will need to resolve an issue. When giving such testimony, the expert often relates relevant principles or generalized information rather than reciting specific statements made by others." (*Ibid*.) "Knowledge in a specialized field is what differentiates the expert from a lay witness, and makes his testimony uniquely valuable to the jury in explaining matters 'beyond the common experience of an ordinary juror.' [Citations.] As such, an expert's testimony concerning his general knowledge, even if technically hearsay, has not been subject to exclusion on hearsay grounds." (*Id*. at p. 676.) *Sanchez* "does not affect the traditional latitude granted to experts to describe background information and knowledge in the area of his expertise." (*Id*. at p. 685.)

"By contrast, an expert has traditionally been precluded from relating case-specific facts about which the expert has no independent knowledge. Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried. Generally, parties try to establish the facts on which their theory

of the case depends by calling witnesses with personal knowledge of those case-specific facts. An expert may then testify about more generalized information to help jurors understand the significance of those case-specific facts. An expert is also allowed to give an opinion about what those facts may mean." (*Sanchez, supra,* 63 Cal.4th at p. 676.)

Our Supreme Court provided several examples to illustrate the distinction between case-specific facts and proper expert testimony. For example, "[t]hat an associate of the defendant had a diamond tattooed on his arm would be a case-specific fact that could be established by a witness who saw the tattoo, or by an authenticated photograph. That the diamond is a symbol adopted by a given street gang would be background information about which a gang expert could testify. The expert could also be allowed to give an opinion that the presence of a diamond tattoo shows the person belongs to a gang." (*Sanchez, supra,* 63 Cal.4th at p. 676.)

The first aspect of Officer Martinez's testimony that defendant challenges under *Sanchez* is his answer that drug possession for sale under the hypothetical facts he was asked to assume "benefits the gang because, like I said earlier, they can use the proceeds to bail people out, buy more guns, pay legal fees, and not hold a job. They don't need a job. They are making a lot of money for the gang." The earlier statement Officer Martinez is referring to in this quote was his testimony that proceeds from gang members criminal activities "have to go back to the gang. In return, the gang buys more guns, buys more drugs to sell, getting more guns, they have more guns to do robberies with and now two people out there to do robberies, get more money, so it feeds on itself." Defendant contends these statements consist of case-specific information, as that term is used in *Sanchez*, and so are inadmissible hearsay.

Officer Martinez's statement referring to bail, guns, and legal fees is unmistakably general background information on how gangs use the proceeds of gang crimes. It is no different than testimony about "how gangs define and protect their turf or territory, the status of various members inside a gang, and how graffiti is used to mark a gang's territory," all of which defendant accepts as general testimony about gang culture, or the

testimony about the role of tattoos in gangs described in *Sanchez* as permissible background expert testimony. (*Sanchez, supra*, 63 Cal.4th at p. 677.)

Officer Martinez's second statement contains information about gang culture generally but also has details which refer to the gang involved in this case. The testimony that crime proceeds "have to go back to the gang" is background information on how gangs work. Although given in response to a hypothetical question, his testimony that "the gang" uses the proceeds to buy more guns to commit more robberies and to buy more narcotics to sell can be construed as a reference to the Pacoima Cayuga gang, whose primary activities were described as robberies, narcotics sales, and witness intimidation.

But the mere fact that evidence concerns a named gang does not make it case-specific as that term is used in *Sanchez*. The *Sanchez* court's example of permissible expert gang testimony is gang-specific: "That the diamond is a symbol adopted by a given street gang would be background information about which a gang expert could testify. The expert could also be allowed to give an opinion that the presence of a diamond tattoo shows the person belongs to a gang." (*Sanchez, supra*, 63 Cal.4th at p. 677.) Further, the Court in *Sanchez* had no difficulty with expert testimony about the specific gang involved in that case. The court noted that defendant did not raise any confrontation claim against [the expert's] "background testimony about general gang behavior or descriptions of the Delhi gang's conduct and its territory. This testimony was based on well-recognized sources in [the expert's] area of expertise. *It was relevant and admissible evidence as to the Delhi gang's history and general operations.*" (*Id.* at p. 698, italics added.) Officer Martinez's testimony quoted above is permissible as a description of a gang's conduct and general operations; his testimony also does not relate specific out-of-court statements made by others (compare *Sanchez, supra*, at p. 672 [describing expert testimony that "relat[ed] statements contained in police documents" and recounted admissions the defendant made to other officers]). The testimony in question is not inadmissible hearsay as defined in *Sanchez*.

The second aspect of Officer Martinez's testimony that defendant contends is testimonial hearsay under *Sanchez* is "Martinez's specific testimony involving [defendant] and his association and activities within the Pacoima Cayuga Gang, which Martinez explained was based upon 'his admissions to me, admissions to other officers, me seeing him associating with other Pacoima Cayuga members, as well as I spoke to their leader, and the leader is telling me this guy is, [defendant], is a member of Pacoima Cayuga Street Locos.'" (App. Opn. Br. at pp. 15-16.) We agree that certain of the reasons Officer Martinez gave for his opinion defendant is a gang member are hearsay, namely, the admissions defendant apparently made to other officers and the conversation Officer Martinez had with the gang's leader. These statements could be testimonial as well, although it is not clear on the record before us without more information about the circumstances in which the statements were made. (See *Sanchez*, *supra*, 63 Cal.4th at p. 697 [reserving decision on whether indicia of defendant's gang membership recorded on a field interview card are testimonial or instead, as the Attorney General contended, information gathered for community policing efforts or potential civil injunctions].) But the other bases for Officer Martinez's opinion—his own observations of defendant (including his "Pacas" tattoo) and his own recollection of defendant's admissions to being a member of the Pacoima Cayuga gang—are not inadmissible hearsay. (Evid. Code, §§ 1200, subd. (a) [defining hearsay as evidence of a *statement* made other than by a witness while testifying], 1220 ["Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party . . ."]; *United States v. Brown* (11th Cir. 2006) 441 F.3d 1330, 1358-1359 [statements by the defendant were admissions of a party-opponent and their introduction into evidence at trial did not violate the Confrontation Clause].) We have no doubt these observations and admissions are proper independent support for Officer Martinez's opinion defendant was a gang member, and the introduction of any additional hearsay on the same point was harmless. (*Sanchez*, *supra*, at p. 698 [standard for assessing whether confrontation error is harmless is whether the error was harmless beyond a reasonable doubt].)

2. The evidence was sufficient to prove defendant maintained a place for the sale or use of narcotics

Defendant contends there is insufficient evidence to support his conviction under Health and Safety Code section 11366, which makes it a crime to maintain a place for the sale or use of narcotics. He argues there is no evidence that his apartment had been made available on a continuous or repeated basis, emphasizing there was evidence of only one incident involving the police, on October 14, 2014, even if there had been other complaints about criminal activity in his apartment complex. We conclude the evidence presented at trial about what the police saw and recovered in defendant's apartment reveals a more extensive operation, one that falls within the ambit of the statute.

Health and Safety Code Section 11366 provides in pertinent part: "Every person who opens or maintains any place for the purpose of unlawfully selling, giving away, or using any controlled substance . . . shall be punished by imprisonment." "'The proscribed "purpose" is one that contemplates a continuity of such unlawful usage; a single or isolated instance of the forbidden conduct does not suffice.' [Citations.]" (*People v. Franco* (2009) 180 Cal.App.4th 713, 718 (*Franco*).) "[E]vidence of a single instance of drug use or sales at the house, *without circumstances supporting a reasonable inference that the house was used for the prohibited purposes continuously or repetitively*, does not suffice to sustain a conviction of the opening-or-maintaining offense." (*People v. Hawkins* (2004) 124 Cal.App.4th 675, 682, italics added.)

When police officers first arrived at defendant's apartment on October 14, they encountered two groups of unrelated people who were under the influence of a narcotic. Although Flores's statement to Officer Potter was not entirely clear, it appears that Flores and her friend were getting high in the apartment complex and defendant made remarks about getting high which led the two women to go to his apartment. When police executed their search warrant, they discovered that surveillance cameras had been installed to monitor the area outside the apartment complex. Officers found an electronic scale, an electronic money counter, a bag containing over 100 doses of

methamphetamine, and over $3,000 in currency. They also found brass knuckles and a handgun.

These items considered together, particularly the cameras and the substantial amount of cash, support an inference that drug sales had occurred in the apartment in the past. The quantity of methamphetamine found, together with the scale and the electronic money counter, also support an inference that additional sales were planned for the future. The evidence as a whole, including the presence of intoxicated people inside the apartment, supports an inference that defendant used the apartment continuously or repeatedly for the sale of controlled substances, and for their consumption on the premises.[6] (See *People v. Hawkins, supra,* 124 Cal.App.4th at pp. 681, 683 [evidence sufficient to support conviction under section 11366 where three people were found in house under the influence, showing immediate past use, and four packaged doses of narcotics indicated intent to use or sell in the future]; see also *Franco, supra,* 180 Cal.App.4th at p. 726 [evidence sufficient to support conviction under section 11366 where large quantity of drugs found in apartment, along with scales, packaging material, large amount of cash, and where evidence showed others had used drugs in apartment in the past].)

B. Substantial Evidence Supports the Trial Court's Denial of Defendant's Batson/Wheeler Motion

Defendant contends the prosecution improperly used peremptory challenges to remove Latino prospective jurors from the jury on the basis of their race, in violation of the principles announced in *Batson, supra,* 476 U.S. 79 and *Wheeler, supra,* 22 Cal.3d 258. We uphold the trial court's decision to deny the defense *Batson*/*Wheeler* motion because the prosecutor offered legitimate, race-neutral reasons for excusing the challenged jurors based on certain of their life experiences revealed during voir dire.

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[6] Our conclusion the evidence is sufficient also disposes of defendant's due process arguments. (*People v. Osband, supra,* 13 Cal.4th at p. 690.)

That the prosecution also offered additional demeanor-based reasons that we agree would have been inadequate on their own does not compel a contrary result.

1. Trial court proceedings

After the prosecution used its fifth peremptory challenge to remove a male Latino juror (No. 2766), defense counsel made a *Batson/Wheeler* motion, contending the prosecution was excluding Latinos from the jury panel. Defense counsel argued the prosecution had previously excused another male Latino juror (No. 8348) and a female Latino juror (No. 7447).[7] The trial court found the defense had made a prima facie showing of discrimination and asked the prosecutor to state his reasons for removing the jurors.

The prosecutor explained that he had excused Juror No. 8348 for "[a] couple [of] reasons. His prior D.U.I. arrest [in] Anaheim, the fact he owns multiple handguns, and his general attitude toward me when I was asking him questions."

The prosecutor said he challenged Juror No. 2766 because "he had multiple family members who are in the San Fernando gang. He told me that people from gangs can be good people, and I also didn't like his demeanor when he was talking to me, and he had a tattoo on his neck."

The prosecutor excused Juror No. 2447 "[f]or a couple of reasons. One, she's a student. She does not work. Her sister is in prison for importing illegal substances. I also didn't like her body language when I was asking [Juror No.] 2766 questions. They were seated right next to each other."

The trial court ruled: "I find the prosecutor's excuses and reasons for excusing those jurors to be legitimate. Again, the court found a prima facie case, and the burden shifts to the prosecution to show that the reasons for exercising the challenges other than the systematic exclusion of members of a cognizable group. And [the prosecutor] has

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[7] The prosecutor had exercised his two other peremptory challenges, the first and third used, to remove white female jurors.

stated valid reasons under the law. [¶] And I find that there has been no showing of purposeful discrimination by the prosecutor, and that his reasons for excusing the jurors were proper under the law. And, therefore, the *Wheeler* motion will be denied." At no point during the trial court proceedings did defendant attempt to make a record that would permit comparative juror analysis (see generally *Miller-El v. Dretke* (2005) 545 U.S. 231, 241), and he likewise makes no attempt to engage in such analysis on appeal.

2. Applicable law

A prosecutor's use of peremptory challenges to exclude prospective jurors on the basis of race violates the California and United States Constitutions. (*Batson, supra,* 476 U.S. at pp. 84-89; *Wheeler, supra,* 22 Cal.3d at pp. 276-277.) "The 'Constitution forbids striking even a single prospective juror for a discriminatory purpose.'" (*Foster v. California* (2016) ___ U.S. ___, ___ [138 S.Ct. 1737, 1747].) "Hispanic-surnamed jurors are a cognizable class for *Wheeler/Batson* purposes." (*People v. Davis* (2009) 46 Cal.4th 539, 584.)

A defendant who challenges the prosecution's use of peremptory challenges triggers a three-step process. "'First, the defendant must make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." [Citation.] Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes. [Citations.] Third, "[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination." [Citation.]' (*Johnson v. California* (2005) 545 U.S. 162, 168, fn. omitted.)" (*People v. Johnson* (2015) 61 Cal.4th 734, 754.) Courts apply this framework to decide whether, under all the circumstances of a case, the presumption that a prosecutor uses peremptory challenges in a constitutional manner has been overcome. (*People v. Williams* (2013) 56 Cal.4th 630, 653-654.)

Here, the trial court found defendant had established a prima facie case and asked the prosecutor to state permissible race-neutral reasons for using the peremptory

challenges. Thus, we review the trial court's determination at the third step of the process, namely, the conclusion defendant had not proven purposeful racial discrimination. At this stage of the process, "'the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.'" (*People v. Lenix* (2008) 44 Cal.4th 602, 613.)

The substantial evidence standard of review applies when a step-three *Batson/Wheeler* determination is at issue. (*People v. Johnson, supra*, 61 Cal.4th at p. 755; *People v. Lenix, supra*, 44 Cal.4th at p. 613.) "When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient." (*People v. Silva* (2001) 25 Cal.4th 345, 385–386.)

3. Analysis

The reasons given by the prosecution for excusing the three jurors in question fall into two categories: (1) reasons based on the jurors' life experiences, such as prior arrests, and (2) reasons based on the jurors' asserted demeanor during voir dire.

The prosecutor's stated reasons concerning the jurors' life experiences are supported by the record. During voir dire, Juror No. 8348 indicated that he had been arrested in Anaheim. There is no verbal discussion of the nature of the arrest, but defense counsel later described the juror as the "gentleman who was arrested and, I guess, convicted of a D.U.I. in Orange County." Juror No. 7447 stated she had a sister who had been in prison for three years for "importing an illegal substance."[8] Juror No. 2766

[8] Defendant points out that the prosecutor stated Juror No. 7447 was a student and did not work, but she actually stated that she was a student and worked part-time. This is

stated that he had family members who belonged to a San Fernando gang. He said, "If someone wants to be a part of something, I can't judge them. Just because they are in a gang doesn't mean anything. That's just what people do." He also stated, "End of the day, I judge people – I judge people off of individuality, not off of what they do. I judge people how they are. Just because they are from a gang or whatever they do, you know, that's them."

Each of the prosecution's life experience reasons is commonly accepted as adequate to support a peremptory challenge. (*People v. Cowan* (2010) 50 Cal.4th 401, 450 [juror's prior arrest]; *People v. Lenix, supra*, 44 Cal.3d at p. 629 [family gang connection in gang case]; *People v. Roldan* (2005) 35 Cal.4th 646, 703 [family member in prison].) The explanations are reasonable and are well accepted as trial strategy. There is substantial evidence to support the conclusion that the prosecutor's life experience explanations were genuine and credible. (See *People v. Lenix, supra,* 44 Cal.4th at p. 613.)

Although defendant does not contest the appropriateness of the prosecution's life experience reasons for excusing the three jurors, defendant does fault the prosecutor's references to the demeanor and attitude of the three jurors in question because the prosecutor did not question the jurors about their demeanor or describe their demeanor in detail for the record by referring to sighing, eye-rolling, lack of eye contact or similar facial expressions. Defendant also emphasizes the trial court did not describe the jurors' demeanor or state whether the court agreed with the prosecutor's observations.

Respondent attempts to defend the demeanor-based reasons along with the life experience justifications, citing cases that hold, as a general matter, that a "prosecutor's demeanor observations, even if not explicitly confirmed by the record, are a permissible race-neutral ground for peremptory excusal, especially when they were not disputed in the trial court. [Citations.]" (*People v. Mai* (2013) 57 Cal.4th 986, 1052, fn. omitted; see

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a minor misstatement which does not cast suspicion on the genuineness of the prosecutor's explanation.

also *People v. Adanandus* (2007) 157 Cal.App.4th 496, 510 [defense counsel's failure to contest prosecutor's demeanor observations "suggest[s] the prosecutor's description was accurate"].) These cases are inapt, however, because the prosecution's demeanor-based justifications here were so vague as to be vacuous.

In the cases on which respondent relies, the prosecutors at least identified some objectionable feature of the demeanor of the jurors stricken. (*People v. Mai*, *supra*, 57 Cal.4th at pp. 1047, 1052 [juror dressed casually and seemed bored and disinterested in the proceedings]; *People v. Adanandus*, *supra*, 157 Cal.App.4th at p. 510 [juror paused and hesitated in answering question during voir dire].) But here, where the prosecutor stated only that he "didn't like" a juror's demeanor or struck a juror because of his or her "general attitude," there is no substance, no observable feature a defense attorney could refute or a trial court could confirm. Such vaguely articulated demeanor objections cannot suffice to carry a prosecutor's burden at the second stage of the *Batson*/*Wheeler* inquiry. (*People v. Lenix*, *supra*, 44 Cal.4th at p. 613 ["A prosecutor asked to explain his conduct must provide a clear and reasonably specific explanation of his legitimate reasons for exercising the challenges"], internal quotation marks and citation omitted; cf. also *People v. Cisneros* (2015) 234 Cal.App.4th 111, 120-121 [prosecution did not carry its burden when it stated it preferred other jurors in the venire and "failed to identify any characteristics whatsoever about Jurors Nos. 6 and 32 or articulate personal observations about their demeanor or even a hunch about them that animated the decision to excuse them"].)

Nevertheless, the fact remains that the prosecutor's other life experience reasons for excusing the three jurors in question are well supported by the record and the trial court expressly found defendant had not carried his burden to prove intentional discrimination. We disagree with defendant's unsupported assertion that the prosecutor's demeanor-based justifications were the primary reasons why the jurors were excused, and we decline to reverse the trial court's ruling simply because the prosecution offered additional, unnecessary reasons for his exercise of peremptory challenges. When a prosecutor gives two reasons for exercising a peremptory challenge, "the trial judge may

have found it unnecessary to consider [the juror's] demeanor, instead basing his ruling completely on the [other] proffered justification for the strike." (*Snyder v. Louisiana* (2008) 552 U.S. 472, 479.)

Defendant also offers a final argument: the demeanor-based reasons, coupled with "the trial court's failure to make any necessary inquiry into the stated excuses" means the reasons "appear to be pretextual" and "implicate[] a 'taint rule' with which any group-based reason 'taints' a group neutral reason and violates *Batson* by itself." In support of this argument, defendant cites *Kesser v. Cambra* (9th Cir. 2006) 465 F.3d 351 (*Kesser*). In that case, the majority concluded the prosecutor articulated no sincere, permissible motives for striking a juror, and in fact made a number of comments disclosing race-based animus. (*Id.* at pp. 357-358.)

Kesser has no application here for two reasons. First, the *Kesser* majority stated it was not deciding whether "mixed motive" analysis should apply in *Batson* cases; the racial animus behind the prosecutor's strikes in that case was clear and there were no permissible motives for the strikes that survived a comparative juror analysis. (*Id*. at pp. 358, 361.) Here, as we have explained, there are legitimate, race-neutral reasons for the prosecutor's peremptory challenges. Second, and even assuming mixed motive analysis might apply in an appropriate case, there were no reasons here that fall on the illegitimate side of the ledger such that there would be a mixed motive determination to be made. The prosecutor's demeanor-based reasons were just insufficiently specific, not indicative of racial discrimination in the way that the prosecution's justifications "using blatant and cultural stereotypes" were in *Kesser*. (*Id.* at p. 357.)

C. Sentence Correction

Defendant contends the trial court miscalculated when imposing a consecutive subordinate prison term of 16 months for the section 186.22, subdivision (b) enhancement to his Health and Safety Code section 11378 conviction. He contends the mid-term for that enhancement is three years, and one-third of three years is 12 months.

Respondent concedes defendant is correct. (§§ 1170.1, subd. (a), 186.22, subd. (b)(1)(A).)

An unauthorized sentence may be corrected at any time, and a failure to object to such a sentence does not foreclose a challenge to the sentence on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 354-355; *People v. Turin* (2009) 176 Cal.App.4th 1200, 1205 [court's computational error can be corrected anytime].) Accordingly, we order the enhancement term corrected to 12 months.

D. Pitchess Motion

The trial court granted defendant's *Pitchess* motion for discovery of any complaints or allegations of "false reports and dishonesty" involving Officer Potter within the last five years. On April 7, 2015, the trial court held an in camera hearing to examine records of complaints made against Officer Potter, if any. The trial court did not order disclosure of any discoverable material to the defense.

Defendant asked us to conduct an independent review of the sealed transcript of the April 7, 2015, in camera hearing to determine if any personnel records were withheld incorrectly. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1232.) We have done so, and find the transcript of the in camera hearing constitutes an adequate record of the trial court's review of any documents it received. The record reveals no abuse of discretion.

DISPOSITION

The term for the section 186.22 enhancement to the count 1 conviction for violating Health and Safety Code section 11378 is ordered reduced from 16 months to 12 months. The superior court shall prepare an amended abstract of judgment reflecting this reduction, which results in a total 20-month sentence on count 1 and a total overall term of imprisonment of 13 years, 8 months. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

TURNER, P.J.

KRIEGLER, J.